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IN THE

Supreme Court of the United States

October Term, 1987

EXPLOSIVES CORPORATION OF AMERICA,
GENERAL INSURANCE COMPANY OF AMERICA,
ROCKCOR, INC.,
Petitioners,

v.

GARLAM ENTERPRISES CORPORATION
AND FEDERAL INSURANCE COMPANY, INC.,
Respondents.

PETITIONERS' REPLY BRIEF

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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INTRODUCTION

Pursuant to Supreme Court Rule 22.5, petitioners Explo, Rockcor, and General Insurance herein reply to arguments first raised in Garlam's brief in opposition, including several flat out mischaracterizations of the record and proceedings below.

Our petition develops that the essential basis[1] upon which successor liability was imposed upon Rockcor for Explo's

[1] Garlam inaccurately characterizes our petition as arguing that "the *only* reason" for substitution of Rockcor was because it financed and controlled the litigation. Our petition addressed at pp. 8-9, in footnote 8, the untenable "holding company" analysis, which is considered further *infra*.

breach of the Explo/Garlam contract, was the First Circuit's determination that Rockcor financed and controlled Explo's litigation, after Explo's dissolution. That dissolution occurred in 1976 (prior to adjudication of the liability issue between Explo and Garlam) when Rockcor—in its capacity as a secured creditor (not as a shareholder)—foreclosed on Explo's assets, in partial satisfaction of a multi-million dollar debt owed by Explo to Rockcor (A. 302). Our petition argues that the imposition of successor liability upon such basis is untenable in light of well-established law, misapplies Fed. R. Civ. P. 25(c), and is a dangerous precedent threatening legitimate interests of creditors of insolvent parties.

Garlam's response is threefold. First, at pages 13-15, it argues that mere financing and control of litigation does justify imposition of successor liability under Fed .R. Civ. 25(c). We do not here reiterate our earlier argument.[2]

Second, Garlam argues that an alternative basis for Rockcor's liability is that one of its officers signed the Explo/Garlam contract, and that Rockcor contractually agreed to be bound as Explo's "holding company."

Third, it argues that liability is also appropriate under three of the four recognized exceptions to successor non-liability. We now develop how these two latter arguments newly and falsely characterize the record and proceedings below.

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[2] It should, however, be noted that nowhere does Garlam confront the critical distinction between being "bound" in the collateral estoppel sense of preclusion from relitigation, and being liable to pay a judgment. *See* discussion of cases relied upon by the First Circuit and Garlam at pp. 10-11, notes 9 and 10, of our petition.

A. It Is Untrue That One Of Rockcor's Officers Signed The Explo/Garlam Contract, Or That Rockcor Expressly Agreed To Be Bound By Its Terms, As A "Holding Company" Or Otherwise, And These False Assertions By Garlam Do Not Provide An Alternative Or Adequate Basis To Support The Imposition Of Successor Liability Upon Rockcor.

Garlam asserts at:

p.I "'[T]he holding company [Rockcor] contractually agreed to be bound by the acts of its subsidiary;"

p.4 "Garlam at all times insisted as a condition to the Garlam-Explo contract that it was to bind Rockcor, the holding company of Explo."

p.9 "As such, Rockcor expressly agreed to be bound by the terms of the Garlam-Explo contract which was negotiated and signed in Puerto Rico by one of Rockcor's officers."

The above statements misrepresent the record below. Appended hereto is a continuation of our petition's appendix. Reproduced at A352 thereof is the signature page of the Explo/Garlam contract. The only two parties there signing are"Garlam Enterprises Corporation contractor by Raymond W. Garffer, President," and "Explo Contractors, a division of Explosives Corporation of America by John W. Goode, General Manager." There is no evidence anywhere in the record that Mr. Goode had any actual or apparent authority to bind or act on behalf of Rockcor. The mere fact that Mr. Hugo Oswald, Jr., who was an officer and director of both Explo and Rockcor, "witnessed" (A. 352) the execution of the Explo-Garlam contract, plainly did not serve to transform the Explo/Garlam contract into an Explo/Rockcor-Garlam contract, and no contrary factual or legal authority has (or can be) cited to the contrary.

Garlam insists that Rockcor is liable to pay damages for Explo's breach of Explo's contract with Garlam, because the Explo-Garlam contract recited that their "holding companies" would be bound. Aside from the trial court's fact-finding (at A. 293) that Rockcor was not Explo's "holding company,"[3] there is another inseparable obstacle to this argument. While Explo may have agreed that its "holding company" would be bound, Rockcor did not. We reiterate that nowhere in the record is there even a scintilla of evidence that Mr. Goode (or Mr. Oswald, or anyone else for that matter) even purported to act for or bind Rockcor in negotiating or executing the Explo-Garlam contract, let alone that he was clothed with actual authority to do so. It is well to remember that the creation of either actual or apparent authority requires "written or spoken words or other conduct of the principal" (emphasis added). RESTATEMENT OF AGENCY (SECOND) 26 and 27 (1958). *See*, e.g., *Moreau v. James River-Otis, Inc.*, 767 F.2d 6 (1st Cir. 1985). The utter absence of evidence of such written or spoken words or other conduct by Rockcor is fatal to Garlam's argument.

B. Garlam's Argument Falsely States That The First Circuit Held That Rockcor Should Be Held Liable For Explo's Judgment On The Basis Of Three Of The Four Recognized Exceptions To The General Rule Of Nonliability Of Parent Corporations For Debts Of Their Subsidiaries.

At page 8 of the opposition brief, Garlam states: "The Court of Appeals found that Explo should properly be substituted for Rockcor as judgment debtor for the following

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[3] Curiously and inconsistently, the First Circuit both *accepts* the trial court's factual findings (A. 44), and conclusiorily asserts (without any analysis of the record, except to note that Rockcor owned all Explo's stock) that Rockcor became liable as a "successor" to Explo's subcontract obligations (A. 58-59).

reasons: . . . " It then outlines its argument under headings numbered 1 (the "holding company" argument) and 2(a), (b) and (c) which state:

> 2. Rockcor is Liable to Respondent as a Successor Judgment Debtor
>
> a) Rockcor Expressly Agreed to Accept All Interest in and to this Litigation.
>
> b) Rockcor Is Merely a Continuation of Its Subsidiary, Explo.
>
> c) The Dissolution of Explo/Excoa and the Subsequent Transfer of All Assets to Rockcor Was Not Notified to Respondent, a Statutory Creditor.

It just is not so. Garlam's three above quoted assertions as to the First Circuit's holdings are simply untrue. The First Circuit expressly left undisturbed the trial court's findings, including a finding that there was no factual basis to establish *any* of the four recognized exceptions. A. 280-308. Rather, the First Circuit believed Rockcor to be liable because it financed and controlled Explo's litigation, and because it considered Rockcor to be Explo's "holding company."

Garlam thus suggests that this Court should affirm a Circuit Court opinion which is otherwise erroneous (for the reasons developed in our petition) on alternative bases (the presence of three of the four recognized exceptions) which are undercut by trial court findings which the Circuit Court has left undisturbed. The suggestion is obviously untenable and improper. The mischaracterization of the First Circuit's true holding is equally improper.

Becuase Garlam's discussion concerning the applicability of the three exceptions is entirely fact based, we deem no reply necessary except with respect to its discussion of certain Washington statutes. Garlam's argument at pages 12-13 that

Washington State statutes (which are reproduced in the appendix hereto) provide alternative bases for substituting Rockcor as judgment debtor, is untenable. RCW 19.40.040 provides that conveyances by insolvent persons to creditors are fraudulent if made "without a fair consideration." RCW 19.40.030 provides that fair consideration exists when "an antecedent debt is satisfied." In our case, the trial judge concluded "that fair consideration was given for the conveyance (from Excoa to Rockcor) and that the same was not fraudulent within the meaning of section 19.40.040, RCWA." (A. 307-308.) This fact-based conclusion was not disturbed by the First Circuit and offers no basis for substituting Rockcor under Rule 25(c), Fed. R. Civ. P.

Garlam also argues that some kind of "fraud" or "bad faith" should be inferred from lack of "notice to creditors" under RCW 23A.28.020 and .040. The first of these statutes involves shareholder consent for voluntary corporate dissolution, and the second requires notice to the secretary of state when a corporation intends to dissolve. Neither statute requires any "notice to creditors." The trial court found that Garlam's entitlement as a creditor, "if any, was but a contingent claim at the time of the transaction" in 1976. (A. 307.) This finding was not disturbed by the First Circuit, and it follows that Rockcor cannot reasonably be substituted for Explo under the statutes cited by Garlam.

C. Explo Was Charged With More Than Costs To Complete Work As Bid.

At page 6 of the Brief in Opposition, Garlam contends that its damage award includes nothing more than costs of "completing the work Explo had agreed to perform." In fact, Garlam recovered its costs of blasting roughly 3 million cubic meters of rock when Explo originally subcontracted to perform

a part of Garlam's prime contract that was estimated at only about 1.5 million cubic meters. See Petition at p. 6.

In note 4 on page 6 of its Brief in Opposition, Garlam raises an argument that Explo's original subcontract required blasting of all overrun quantities (as ultimately performed by Garlam). To the extent this is true, however, Explo's subcontract expressly incorporated prime contract provisions promising an equitably renegotiated unit price for the excess work. *See* Petition at p. 6, note 5. As reflected in portions of the First Circuit's opinion quoted on page 7 of Garlam's Brief, the appellate court refused to credit Explo with the equitable price increase that was guaranteed by contract and common law.

Garlam's Brief does not even attempt to contradict Explo's authorities to the effect that terminated subcontractors must be credited with price adjustments for quantities of work in excess of those indicated in their original agreements.

CONCLUSION

Garlam's opposition mischaracterizes the record and proceedings below. It does not confront the essential issues raised in the petition.

DATED this 20th day of October, 1987.

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